Texaco, Inc. *and* Richard E. Turner, Kenneth N. Meyer, and Don W. Gibson. Cases 19-CA-12349, 19-CA-12390, and 19-CA-12409

March 24, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On April 24, 1981, Administrative Law Judge William L. Schmidt issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and counsel for the General Counsel filed a memorandum in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order.[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Texaco, Inc., Anacortes, Washington, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

[1] In adopting the Administrative Law Judge's Decision, and particularly his remedy, Member Jenkins does so for the reasons set forth in his dissent in *E. L. Wiegand Division, Emerson Electric Co.*, 246 NLRB 1143 (1979), enfd. as modified 650 F.2d 463 (3d Cir. 1981).

Members Fanning and Zimmerman find it unnecessary to reach the remedial issue set forth in *Emerson Electric Co., supra*, since the result in this case is the same under either the majority or dissenting approach.

[2] In his Decision, the Administrative Law Judge lists all of Respondent's various benefit plans, while in his remedy the Administrative Law Judge recommends that Respondent make Gibson, Meyer, and Turner whole for "all losses" which they suffered. We note in this regard that at the hearing and in his brief counsel for the General Counsel only presented evidence with respect to losses attributable to Respondent's termination of accident and sickness, medical, and pension benefits to the abovementioned discriminatees. We shall therefore leave until the compliance stage the determination of what additional losses of benefits, if any, exist for which the discriminatees are entitled to compensation.

[3] With respect to the backpay involved, Member Jenkins would compute the interest in accordance with the formula set forth in his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing before an administrative law judge, at which all parties were provided with the opportunity to present evidence and arguments, the National Labor Relations Board concluded that we violated the rights of employees by treating three employees, who had been excused from work on medical leaves of absence before the beginning of the strike in January 1980, as striking employees for the entire duration of that strike where the evidence was insufficient to show that they actively participated in the strike or publicly supported the strike. To remedy this matter, the National Labor Relations Board has ordered us to post this notice and to comply with its terms.

The Act gives employees the following rights:

To engage in self-organization
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
To refrain from the exercise of any or all such activities.

WE WILL NOT consider any employee to be engaged in a strike where that employee has been excused from work on a medical leave of absence before the beginning of a strike unless we learn that the employee is actively participating in the strike, publicly supporting the strike, or fails to return to work at the conclusion of the medical leave if that occurs during the strike.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL make Don W. Gibson, Kenneth N. Meyer, and Richard E. Turner whole, with interest, for the losses they suffered as a consequence of our treating them as striking employees for the entire duration of the strike which began on January 8, 1980.

TEXACO, INC.

DECISION

STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, Administrative Law Judge: This matter was heard by me in Seattle, Washington, on October 30, 1980, based on a consolidated complaint of the General Counsel and an answer of Texaco, Inc., the Respondent herein.[1] On October 15, 1980, the consolidated complaint was amended. The complaint, as amended, and the Respondent's answer place in issue the question of whether or not the Respondent discriminated against the Charging Parties by terminating their sickness and accident benefits and by refusing to make life and health insurance contributions on their behalf for the duration of a strike by the Union which represents them.[2]

After the hearing the General Counsel and the Respondent filed briefs which have been carefully considered.

Upon the entire record (as corrected in accord with the General Counsel's unopposed motion related to transcript errors which I hereby grant) and my observations of the witnesses who testified in this matter, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Delaware corporation, is engaged in business at Anacortes, Washington, refining petroleum products. The Respondent's Anacortes refinery (known as the Puget Sound refinery) is the only facility of the Respondent involved in this proceeding. During the calendar year preceding the issuance of the complaint, the Respondent sold and shipped products valued in excess of $50,000 directly to customers located outside the State of Washington or to customers located within the State of Washington which were, in return, directly engaged in interstate commerce. In the same period, the Respondent purchased goods and services for use at its facilities in the State of Washington valued in excess of $50,000 directly from suppliers outside the State of Washington or from suppliers within the State of Washington which, in turn, had received said goods directly from locations outside the State of Washington. On the basis of the foregoing and the entire record, I find that the Respondent is an employer within the meaning of Section 2(2) of the Act, engaged in commerce within the meaning of Section 2(6) and (7) of the Act. I further find that it would effectuate the purposes of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

The Oil, Chemical and Atomic Workers International Union, Local 1-591, AFL-CIO (the Union), is a labor organization within the meaning of Section 2(5) of the Act.[3]

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

As noted above, the issue as framed by the pleadings is whether or not the Respondent violated Section 8(a)(1) and (3) of the Act as to the Charging Parties when it discontinued payment of accident and sickness (herein called A & S) benefits to the three workers and refused to make required contributions, or appropriate credits, under other fringe benefit plans, at the time their collective-bargaining representative commenced a strike among unit employees in support of its economic demands. All this occurred as a result of what, in effect, amounted to the Respondent's reclarification of the status of the Charging Parties from that of disabled employees to that of strikers at the outset of the strike.

The Puget Sound refinery was opened in 1958. Shortly thereafter, the Union was selected as the collective-bargaining representative of certain of the Respondent's employees.[4] From that approximate period until the present, the Respondent and the Union have negotiated a series of successive collective-bargaining agreements applicable to the represented group. With the exception of the agreements concluded in 1969 and 1980, the parties thereto have successfully concluded their negotiations without the occurrence of strike action.

B. *The Current Collective-Bargaining Agreement and Benefit Plans*

The current collective-bargaining agreement was executed on January 24, 1979, and is effective for a term lasting from January 8, 1979, to January 8, 1981. A feature of that agreement is that the Union was permitted to reopen the the agreement in a period prior to its first anniversary for the purpose of negotiating new terms on wages, health and welfare benefits, and vacation pay.[5] According to Walter von Wald, an International representative who services Local 1-591, a vote authorizing the Union to conduct a strike was concluded in late 1978 shortly prior to the successful conclusion of the current agreement and the Union considered the strike authorization applicable to the 1979-80 reopener negotiations. Accordingly, no membership strike vote was conducted prior to the strike material herein.

---

[1] The consolidated complaint was issued on June 3, 1980, based on the charges listed in the caption. The charges were filed by Turner, Gibson, and Meyer (the Charging Parties) on April 24 and May 9 and 19, 1980, respectively.

[2] At the hearing, the General Counsel withdrew the allegation pertaining to life insurance but asserted that Turner was further injured by the denial of pension credits which would have otherwise accrued absent the Respondnet's actions at the outset of the strike.

[3] The complaint and the answer pertain only to the International Union. The evidence adduced in this case discloses that Local 1-591 is the certified and recognized representative and that the relevant collective-bargaining agreement is between the Respondent and Local 1-591. As to the issues in this aforementioned collective-bargaining agreement, I find that Local 1-591, and not the International Union, is the pertinent labor organization.

[4] According to the collective-bargaining agreement, the unit encompasses all employees, excluding salaried clerical employees, plant protection employees, laboratory employees, technical employees, and professional and supervisory employees. At the time of the strike, there were approximately 235 unit employees and 100 nonunit personnel employed at the Puget Sound refinery.

[5] The terms of the reopening feature were never precisely explained but its existence is not disputed.

The current agreement incorporates by reference certain of the Respondent's fringe benefit plans at article XIII, section F. Special provision is made which limits the scope of arbitration permitted over the benefit plans. The collective agreement also contains a grievance-arbitration provision and a no-strike, no-lockout provision. In this latter regard, the no-strike provision prohibits the Union from striking over any matter which may be subject to the grievance procedure but permits strikes over matters which are not subject to the grievance procedure if a notice of intent to strike and an opportunity to bargain is provided within a specified period in advance of such action. If, however, the Union exercises its right to strike in such an instance during the term of the agreement, a further provision provides, "[A]ll obligations imposed upon the parties to this Labor Agreement will be suspended with the commencement of such strike and shall continue to be suspended unless and until it's mutually agreeable to both parties to reimpose said obligations." There is nothing by way of a pleading in the nature of an affirmative defense alleging that the strike here was conducted pursuant to the aforementioned exception to the no-strike provision or that the Respondent was contractually privileged to suspend the payments, contributions, and credits which form the basis of the General Counsel's complaint. Likewise, no such claim was made at the hearing and the briefs of the parties are silent with respect to the applicability of the contract suspension provision to the issues here.[6]

In addition to the A & S plan, article XIII, section F, of the collective-bargaining agreement incorporates the following benefit plans into the agreement: (1) a permanent total disability plan; (2) a group pension and group life insurance plan; and (3) a severance pay allowance plan. The evidence also shows that an agreement exists between the Respondent and the Union whereby unit employees are provided with a hospital-surgical-major medical benefits plan which, in the instance of the Puget Sound employees, is administered by the Skagit County Medical Bureau although no reference is made to this plan in the collective-bargaining agreement. The existence of the additional fringe benefits caused the General Counsel to plead and argue in a somewhat meandering fashion. Thus, by the amendment to the complaint, the General Counsel sought to charge the Respondent with additional liability for failing to pay the Charging Parties' health and life insurance premiums in the strike period. Thereafter, at the hearing, the General Counsel deleted the life insurance allegation but, for the first time, asserted that the Respondent was required to credit Turner for the strike period under the existing retirement plan. In addition, the amendment to the complaint alleges that Gibson, upon retirement in September 1980, was paid the A & S benefits withheld during the strike and at the hearing the General Counsel asserted that only interest on those funds for the period withheld was being sought. However, in his brief, the General Counsel urges that the question of whether Gibson was fully paid for the lost A & S benefits upon his retirement is not clear for some unexplained reason and should be left to the compliance stage of the proceedings. Suffice it to say, however, that the real vice complained of in cases of this nature is the treatment of employees excused from work for disability reasons as strikers and, to the extent that that results in losses to the disabled employees in violation of Section 8(a)(3), those losses are appropriately a matter of remedy under a make-whole order—the usual remedy in 8(a)(3) cases.

Under the accident and sickness benefit plan (which appears to be a corporatewide disability benefit plan) employees with 10 or more years of service (as is the case here) are protected against the economic consequence of a disabling sickness or accident by the payment of benefits equal to full pay for the first 13 weeks and benefits equal to half pay for 39 weeks. Payments under the plan are made from the Company's general assets and no employee contribution is required. The plan contains provisions for disqualifying employees for nonoccupational disabilities if the illness or accident occurs while the employee is on: (1) a leave of absence for military service; (2) a leave of absence for personal business; (3) layoff; (4) vacation, unless the period of disability continues beyond the time scheduled for the employee to return to work; or (5) directly or indirectly from the employee's own misconduct. In the event of an occupational injury, benefits paid under workmen's compensation laws are deductible from those paid under the A & S plan. In addition, the Respondent has the right to appoint a physician to determine the probable future frequency or duration of compensable absences and whether or not the employee is taking appropriate steps to expedite his recovery.

According to a stipulation at the hearing, employees on less than full pay for more than 15 days in any calendar month do not receive a pension credit for that month. Only Turner would have qualified for a pension credit during the strike here as Gibson and Meyer were already receiving half pay under the A & S plan by the time the strike commenced.

Under the Respondent's medical plan, the Respondent pays the greater portion of the premium and the remainder is contributed by the employee. As noted, the plan is administered by the Skagit County Medical Bureau. During the strike, the Union and the Respondent reached an agreement with the Bureau whereby the strikers' premiums would be collected from the existing reserve which had theretofore built up as a result of a favorable claims experience. As explained by Jesse H. Long, the Respondent's supervisor of employee relations, the reserve actually belongs to the Respondent and the employees in pro rata shares equal to their contribution. Nonetheless, during the strike the reserve was adequate to cover the strikers' premiums, which the Respondent declined to pay because of strike action. However, it appears that as the Respondent treated the Charging Parties as strikers in all respects, portions may have been

[6] In my judgment, a claim that the Respondent was contractually privileged to suspend the payments and credits here would be an affirmative defense which it would be required to plead and prove. This is especially true where, as here, the evidence of a reopener, while uncontradicted as to its existence, is not sufficiently specific to permit the conclusion that the Union struck after the agreement was reopened pursuant to the exception to the no-strike clause or some other side agreement. The suspension provision, however, is—by its terms—applicable only in the event a strike occurs under the no-strike exception in the agreement.

drawn from the reserve to cover their premiums during the period of the strike.

C. *The 1980 Strike*

The final two meetings between the Union's and the Respondent's negotiators concerning an effort to reach an agreement over matters subject to the reopener occurred on January 7 and 8, 1980. At the January 7 meeting, the Union announced that in the event no agreement was reached by 4 p.m. on January 8 it intended to commence an economic strike to support its demands.

At the bargaining session held prior to the commencement of the strike on January 8, the Respondent made an additional offer which was rejected by the Union. The Respondent's bargaining notes show that it then advised the Union that it intended to operate the plant in the event of a strike and that the benefit plans would be "administered" in the following fashion:

> Management stated that in the event of a strike the Labor Agreement at the very minimum would be suspended and possibly terminated. The Administration of Benefit Plans was then outlined to the committee as follows:
>
> 1. *Pension*
>
> The Group Pension Plan provides that an employee will be credited with one month of Benefit Service for any calendar month that the employee is *not* absent from work with less than full pay for 15 days or more. Furthermore, the Plan provides that the employe's pension contributions, if any, will be suspended during any calendar month that the employe does not earn Benefit Service.
>
> Therefore, if an employee is on strike for 15 days or more during any calendar month,
>
> (a) The employe will not be credited with any Benefit Service for that month, and
>
> (b) The employe's pension contributions, if any, will not be collected that month; they will be suspended.
>
> 2. *Savings Plan*
>
> Similar to the Group Pension Plan, the Employee Savings Plan provides that if an employee is absent from work with less than full pay for 15 days or more in any calendar month, the employee will not be permitted to make contributions to the Plan for that month, nor will the Company contribute to the Plan in the employe's behalf that month.
>
> 3. *Hospital and Surgical Benefits Plan (See Note) (Including Dependent's Insurance)*
>
> In order to continue medical coverage under a Company-sponsored Medical Plan, striking employees will be required to pay the total premium (employe's contribution plus the contribution normally made by the Company in their behalf) for the duration of the strike. However, for the months in which the strike begins and terminates, the Company will contribute a *pro rata* share of its normal monthly contribution based on the period worked by employees during the first and last months of the strike. Employees will be required to remit to the Company their total premium, less the Company's pro rata contribution during the first and last months of the strike, at the beginning of each month of the strike in order to continue medical coverage for themselves and their dependents.
>
> 4. *Life Insurance* (See Note)
>
> *Non-Contributory*: Non-contributory life insurance coverage will remain in force for the duration of the strike.
>
> *Contributory*: Contributory plan members will be required to pay in advance their normal monthly contribution for their contributory life insurance coverage for the month in which the strike begins, if such contributions have not already been made through normal payroll deductions, and at the beginning of each subsequent month that the strike continues in order to keep the insurance in force.
>
> 5. *Accidental Death and Dismemberment (AD&D) Insurance Plan* (See Note)
>
> Plan participants will be required to pay in advance their normal monthly contribution for their AD&D coverage for the month in which the strike begins, if such contributions have not already been made through normal payroll deductions, and at the beginning of each subsequent month that the strike continues in order to keep the insurance in force.
>
> 6. *Accident and Sick (A&S) Benefit Plan*
>
> Upon commencement of a strike, all A&S benefits will be discontinued, except in those cases involving industrial accident or injury. A&S benefits will be continued to those employees who are disabled due to industrial injury until medically released by their doctors or until expiration of such benefits in accordance with the Plan's benefit schedule, whichever occurs first.
>
> Decision will be reserved regarding the payment of A&S benefits upon termination of the strike for employes who become disabled during the strike and whose disability continues beyond the termination of the strike.
>
> Decision will also be reserved regarding the resumption of A&S benefits which were discontinued at the beginning of the strike for those employees who are still disabled after the termination of the strike.
>
> Under no circumstances will A&S benefits be payable if they would not have been payable in the absence of a strike.
>
> 7. *Vacations*
>
> Employees on vacation when a strike commences may continue on vacation status for the balance of the week in which the strike occurs, subject to the vacation rules in effect at that time.

No other vacations will be granted during a strike, and vacations scheduled to commence during the strike period will be rescheduled following termination of the strike.

8. *Jury Duty Absence*

No payment will be made for absences for jury duty during a strike.

9. *Death in Family Absence*

No payment will be made for absence due to death in the family during a strike.

10. *National Guard Encampments*

No payment will be made for military training occurring during a strike.

NOTE: If an employe elects to discontinue making his or her normal premium contributions to keep insurance coverage in force, such insurance coverage will be terminated, and the employe will be required to furnish evidence of insurability to the insurer upon termination of the strike in order to reinstate such coverage. In the case of the Accidental Death & Dismemberment Insurance Plan, the employe will not be eligible to re-enter the Plan until the April 1 or October 1 first following the end of the strike.

Employe may call Payroll to find out the amounts they will be required to pay for medical insurance, contributory Life Insurance and AD&D Insurance.

The Union had been advised the previous day that Gibson, Meyer, and Turner were the only three individuals who were receiving accident and sickness benefit payments at that time. According to von Wald, he was not certain if the Union specifically told the Respondent that Gibson, Meyer, and Turner were not strike participants but that it was aware that that was the Union's position. Long testified that at no time did the Union indicate in any fashion that the strike would not be "total." However, Long conceded that Gibson, Meyer, and Turner's names were never mentioned in this regard and that he had no recollection as to what was said about the Union's position regarding the strike or nonstrike status of the three disabled employees. The Respondent's minutes of the bargaining session held toward the end of the strike on March 29 disclose that the negotiators discussed the right of the Union and the individuals to pursue the payment of the A & S benefits. This record of the discussion at that time merits the inference that at least prior thereto the Union had taken the position that the A & S benefits were payable to Gibson, Meyer, and Turner during the strike.

On January 8, at 4 p.m., the Union commenced its strike against the Respondent at the Puget Sound plant. Managerial, supervisory, and unrepresented nonunit employees, as well as a few Texaco employees from other locations, performed unit work during the course of the strike in order to maintain production. Although two or three unit employees terminated their employment with Texaco during the strike period, no unit employee (including any of the Charging Parties) offered to return to work during the course of the strike. The strike continued through April 13, 1980. It was terminated by an agreement on the initial economic issues and a separate strike settlement agreement. In its answer, the Respondent asserted that the strike settlement precluded this action but in its brief the Respondent moved to delete that defense. In view of the evidence adduced here, the Respondent's motion is granted.[7]

D. *The Discriminatees*

For a period of time prior to the strike, Gibson, Meyer, and Turner had been absent from work on medical leaves and were drawing the A & S benefits. In Gibson's instance, the evidence shows that he had been absent from work since approximately September 1979, with a condition diagnosed as scoliosis. At the time of the strike, Gibson was processing a claim that his condition was related to an occupational injury but it appears that this claim (which the Respondent disputed) was resolved against him. Gibson's condition persisted throughout the strike and thereafter. Eventually, in September 1980, Gibson's disability compelled his retirement. Meyer testified that his disability resulted from being struck by an automobile on July 14, 1979. As a consequence, Meyer suffered a compound fracture of a leg and an arm, and was confined to a wheelchair for approximately 5 months. Although Meyer could walk fairly well by the time the strike commenced, he was not released to return to work by his physician until May 5, 1980. Turner was hospitalized for a week commencing December 1, 1979. Turner testified that "first I thought I had an ulcer which in turn turned into a heart attack and both." Following his hospitalization, Turner convalesced at home until he was released to return to work by his physician during the week immediately prior to the end of the strike.

There is no evidence that the Respondent directly communicated with any of the three affected employees at any time immediately prior to the strike or during the strike. The three employees learned of the discontinuance of the A &S benefits when they received checks in January 1980, which paid them for benefits only through January 8. There is no evidence that any of the three employees sought to protest directly to the Respondent about the discontinuance of benefits.

Gibson, Meyer, and Turner reside in Mt. Vernon, Washington, which is approximately 20 miles from Anacortes where the refinery and the Union's office are located. They have all been employed at the Puget Sound refinery almost from the time that it became operational. Likewise, the three men had all been members of the Union for nearly as long as it had been the bargaining representative but none had ever held any union leadership position. All three participated in the 1969 strike by engaging in picketing duties or performing tasks at the

[7] However, in view of the General Counsel's asserted inability to locate any cases pertaining to the right of the Charging Parties to maintain this action notwithstanding the terms of the strike settlement agreement, it is suggested—for his own edification—that he read the lead case which he cited in support of his argument on the merits from start to finish.

union office in support of the strike activity. None of the three employees engaged in any similar strike activity during the 1980 strike. However, there is evidence that, during the course of the 1980 strike, they paid social visits to the Union's office to visit fellow workers they had been unable to see for a long period but these visits were limited to only one to two occasions where they occurred at all. In addition, there is evidence that Gibson attended the last union meeting before the end of the strike where the strike settlement was ratified and that Meyer attended one or two union meetings during the strike where contract offers were considered. However, numerous other meetings were held during the strike which were not attended by the Charging Parties.

During the course of the strike, the Union paid the striking employees at a $20-per-week benefit. According to von Wald, the membership voted to extend this benefit to the disabled employees as their A & S benefits had been terminated. The evidence shows that none of the disabled employees initiated a request for the benefits. In Gibson's instance, the availability of the $20-per-week benefit was not known by him until late in the strike and, as a consequence, he received payments from the Union for only the last 2 weeks of the strike. It was not until late January that Turner learned of the availability of the Union's benefit to the disabled employees.

E. *Additional Findings and Conclusions*

The foregoing establishes that the Respondent, on January 8, 1980, automatically altered the status of Gibson, Meyer, and Turner from that of employees excused from work for medical reasons to that of striking employees notwithstanding that it had no evidence that those employees were actually engaged in a strike against it, publicly supporting such a strike, or were medically released for return to work. By doing so, the Respondent precluded those employees from receiving benefits normally available to employees on medical leaves of absence. In its brief, the Respondent asserts that on the basis of the long-term union membership of the Charging Parties, their acceptance of the so-called strike benefits, their past actions in support of the 1969 strike, their limited visits to the Union's offices during the most recent strike and, in general, their proclivity to be loyal to the Union. It should be entitled to presume that the Charging Parties were striking the same as their able-bodied brothers who left their work stations when the Union called. Therefore, the Respondent's argument goes, notwithstanding that the three employees had theretofore been absent on excused disability leaves, it was fully justified in treating them as strikers by discontinuing the payment of A & S benefits and the other contributions and credits which it would have afforded them in the absence of the strike. Such a presumption made under materially identical circumstances was specifically precluded by the Board in *E. L. Wiegand Division, Emerson Electric Co.*, 246 NLRB 1143 (1979). The Respondent recognizes this fact but argues that I should not "blindly adhere" to *Emerson*. Nevertheless, the Respondent makes no significant attempt to factually distinguish this case from *Emerson*. Instead, the Respondent articulates numerous arguments concerning the continued good health of *Emerson* in view of the 1980 general election results and otherwise contends that it is an ill-advised part of the national labor policy. The Respondent urges that the Board return to the doctrine expressed in *Southwestern Electric Power Company*, 216 NLRB 522 (1975), in resolving cases of this nature. The Respondent obviously believes that this action is essential so that the principle that no employer should be compelled to finance a strike against itself may be restored to its rightful position of primacy among the principles governing conduct during strikes. Whether one chooses to label it "blind adherence" or otherwise, the fact remains that I am not at liberty to do other than follow precedent established by the Board until either the Board or the Supreme Court changes it. *Lenz Company*, 153 NLRB 1399 (1965); *Iowa Beef Packers Inc.*, 144 NLRB 615 (1963); *Insurance Agents International Union, AFL–CIO (Prudential Insurance Company)*, 119 NLRB 768 (1957). As I have concluded that the Respondent has failed to demonstrate that the Charging Parties engaged in conduct evidencing that they participated in strike activity or gave public support for the strike, I find the Respondent was not justified in presuming that Gibson, Meyer, and Turner were strikers and treating them as such from the very outset of the strike. By doing so, the Respondent violated Section 8(a)(1) and (3) of the Act. *Emerson Electric, supra.*

Notwithstanding this disposition, some of the Respondent's arguments merit some observations. One argument which the Respondent advances here and which is invariably advanced against the wisdom of the Board's current policy in cases of this nature is that the *Emerson* standard fails to take into account the fact that it would be unlawful for an employer to interrogate disabled employees about their participation in strike activities and, hence, employers are deprived of one of the most cogent means of obtaining the evidence that is necessary in order to discontinue the payment of such benefits. The genesis of this argument is found in the Board's own *Southwestern* decision wherein it was asserted that "clearly" it would not be lawful to interrogate disabled employees as to their strike sympathies. Cited in support of that assertion is *Farmers' Cooperative Compress*, 169 NLRB 290 (1968). Although it is true that in *Farmers'* the employer's interrogation of employees as to whether they intend to participate in a threatened strike was found to be unlawful, that is only half of the story. The other half of the *Farmers'* story is that the *purpose* of the interrogation was to ascertain those employees who might be amenable to a bribe for the purpose of remaining at work in order to break the union. In my judgment, factual distinction between *Farmers'* and the situation where an employer makes a good-faith effort to ascertain what employees on excused leaves are doing is similar to the difference between night and day. Hence, *Farmers'* lends absolutely no support to the proposition that an employer is generally prohibited from making a noncoercive inquiry of a disabled employee as to whether the employee is doing *anything* inconsistent with a legitimate leave of absence. This is so regardless of whether the inquiry is directed toward ascertaining the truth of rumors that the employee was engaged in digging a sewage

ditch in front of his house, scaling the Empire State building, or walking a striking union's picket line shouting "scab" at nonstriking employees. To conclude otherwise would be inexplicably inconsistent with the principles settled upon over 25 years ago in *Blue Flash Express, Inc.*, 109 NLRB 591 (1954).

Likewise, the Respondent's argument that the Board lacks authority to regulate the economic weapons available to labor and management in strike situations also lacks merit. This argument is grounded upon dicta of the Supreme Court in a number of cases cited by Respondent. As with all dicta, it should be considered carefully in the context in which it appears. One need go no further than the same Court's opinion and holding in *Mastro Plastics Corp* v. *N.L.R.B.*, 350 U.S. 270 (1956), to recognize that the Court had no intention of creating a legal no-man's land whenever a strike occurs as the Respondent's argument implies.

Moreover, the Respondent faults the *Emerson* doctrine by asserting that it compels the type of discrimination prohibited by the Supreme Court in *N.L.R.B.* v. *Great Dane Trailers, Inc.*, 385 U.S. 26 (1967), in that *Emerson* requires payments to disabled employees who do not publicly support a strike but not to other disabled employees who do show public support of a strike. The fallacy of the point the Respondent seeks to make in this argument is quickly apparent when it is recognized that similar discrimination would exist if the Board returned to the *Southwestern* doctrine as the Respondent urges. The only difference could be that the shoe would be on the other foot—the employer would be required to pay benefits to all disabled employees who publicly disavowed the strike and would be permitted to withhold benefits from those who did not. More troublesome in this case from the perspective of the *Great Dane* case is the Respondent's decision here to pay A & S benefits to those disabled on the job while refusing to pay A & S benefits to those disabled off the job. The logical justification for requiring (as Respondent urges) one group—those disabled off the job—to disavow the strike activity while permitting the other group—those disabled on the job—to be in an equal position by doing nothing is not readily apparent to me. However, having already concluded that the Respondent violated the Act on other grounds, I find it unnecessary to further consider this unexplained dichotomy.

Finally, the Respondent asserts that I committed prejudicial error by sustaining the General Counsel's objection to its questioning of Gibson and Turner as to whether they would have participated in the strike had they not been disabled. Entirely apart from the fact that implicit in the question itself is a concession that they did not participate in the strike, the question otherwise seeks to elicit nothing of relevance under current case law. Accordingly, the rulings are reaffirmed.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The unfair labor practices of the Respondent found to exist in section III, above, occurring in connection with the Respondent's operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having concluded that the Respondent has violated the Act in the manner specified above, it is recommended that the Respondent be required to cease and desist therefrom and to take certain affirmative action designed to effectuate the purposes of the Act.

Affirmatively, it is recommended that the Respondent be required to make Gibson, Meyer, and Turner whole for *all* losses they suffered as a result of the Respondent's presumption that they were striking employees for any portion of the period between January 8, 1980, through April 14, 1980, when their respective physicians had not released them to return to work with the Respondent. In Turner's instance, the record herein clearly shows that he was specifically released by his doctor during the final week of the strike. As the evidence shows that the Respondent did not require a written release before permitting Turner to return to work, the Respondent's obligation to make him whole shall terminate when Turner was first advised of his release by his physician whether made orally or in writing.[8] To the extent that it is determined that the health insurance reserve was depleted by the Respondent's failure to pay the Charging Parties' premiums during the strike period, the Respondent shall be required to reimburse the reserve only to the extent of its pro rata share of the premium. The computation of backpay herein shall be in the manner provided by the Board in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon as provided by the Board in *Olympic Medical Corporation*, 250 NLRB 146 (1980), and *Florida Steel Corporation*, 231 NLRB 651 (1977). And see, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). To the extent that it may be determined in the compliance stage of this proceeding that the Respondent must reimburse any trust fund in order to fully make the Charging Parties whole for their losses, interest on such amounts shall be determined in accordance with the Board's discussion of that question in *Pullman Building Company*, 251 NLRB 1048 (1980), and the cases cited therein. It is also recommended that the Respondent be ordered to post the attached notice to employees at its Puget Sound refinery and to thereafter notify the Regional Director for Region 19 of the steps that it has taken to comply with the recommended Order entered hereinafter.

CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(2) of the Act, engaged in commerce or in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

[8] In this connection, the General Counsel's contention that the controlling date as to Turner should be the date he received the release in the mail is rejected. The controlling date is intended to be the date of Turner's visit to his physician wherein the release actually occurred plus any period of additional convalescence the physician may have specified at that time for Turner before actually returning to work.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By automatically altering the employee status of Don W. Gibson, Kenneth N. Meyer, and Richard E. Turner on January 8, 1980, from that of employees excused from work for medical reasons to that of employees engaged in a strike against it, the Respondent has violated Section 8(a)(1) and (3) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Pursuant to Section 10(c) of the Act and upon the foregoing findings of fact and conclusions of law and the entire record herein, I hereby issue the following recommended:

ORDER[9]

The Respondent, Texaco, Inc., Anacortes, Washington, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Automatically altering the status of any employee excused from work on a medical leave of absence to the status of a striking employee upon the commencement of any strike, and continuing said change of status in effect thereafter, in the absence of evidence that such employee actively participated in strike activity, gave public support therefor, or failed to return to work upon being medically released for that purpose in the course of any such strike.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action deemed necessary to effectuate the policies of the Act:

(a) Make Don W. Gibson, Kenneth N. Meyer, and Richard E. Turner whole in the manner set forth above in the section entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board, or its agents, all records necessary to analyze the amounts due under the remedial order herein.

(c) Post at its Puget Sound refinery in Anacortes, Washington, copies of the attached notice marked "Appendix."[10] Copies of said notice, on forms provided by the Regional Director for Region 19, after being duly signed by its representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by it to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 19, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

[9] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[10] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."